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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE RICHARD SEEBORG, JUDGE

IN RE TEZOS SECURITIES LITIGATION) NO. C 17-06779 RS

San Francisco, California
Thursday, March 7, 2019

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued, next page)

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1 Thursday - March 7, 20191 1:32 p.m.2 P R O C E E D I N G S3 **THE CLERK:** Calling Case C-17-6779, in re Tezos
4 Securities litigation. Counsel, please state your
5 appearances.6 **MR. TA:** Good afternoon, Your Honor. Hung Ta on
7 behalf of the plaintiffs.8 **THE COURT:** Good afternoon.9 **MR. HU:** Good afternoon, Your Honor. Alex Hu, also
10 counsel for the lead plaintiff.11 **THE COURT:** Good afternoon.12 **MR. FLEMING:** Good afternoon, Your Honor. Joel
13 Fleming, Block & Leviton, counsel for Trigon.14 **THE COURT:** Good afternoon.15 **MR. KLEIN:** Good afternoon, Your Honor. Brian Klein
16 for Arthur and Kathleen Breitman.17 **THE COURT:** Good afternoon.18 **MR. MALZAHN:** Good afternoon, Your Honor. Scott
19 Malzahn, with Baker Marquart, for Arthur and Kathleen
20 Breitman.21 **THE COURT:** Good afternoon.22 **MR. POTISCHMAN:** Good afternoon, Your Honor. Neal
23 Potischman, Davis Polk, for the Tezos Foundation.24 **THE COURT:** Good afternoon.25 **MR. GIBBS:** Good afternoon, Your Honor. Patrick

1 Gibbs from Cooley for Dynamic Ledger Solutions.

2 **THE COURT:** Good afternoon. So this matter is on for
3 the request to substitute the lead plaintiff. Let me make
4 some preliminary comments, because I had a chance to take a
5 look at what you submitted.

6 I am not inclined to open this PSLRA process up completely
7 again. I don't think we need a new amended complaint. I
8 certainly don't think we need a new round of motions to
9 dismiss, which is a non-starter, as far as I'm concerned. But
10 I do think that I can't simply look at the lead counsel, to
11 say: Well, substitute someone new in, unless there is a basis
12 for doing that.

13 And my understanding is that the person that they propose
14 to substitute in was not amongst those who had sought
15 appointment under the PSLRA process at the beginning, which
16 would then indicate, I think, we would go to Trigon Trading.
17 And they have their own counsel that they would like to have
18 appointed.

19 What I am inclined to do is so we don't -- the class does
20 not lose the work that Mr. Ta and his colleagues have done, is
21 to have Trigon Trading come in, but then have a co-lead counsel
22 situation, with counsel for Trigon Trading, and then Mr. Ta.

23 I know there's a third firm that Trigon Trading wants, but
24 I would be inclined to do it co-lead with the -- one from
25 Trigon Trading, and then Mr. Ta, who's been already in the

1 case.

2 So that's my tentative view of things. Who wants to start
3 off the discussion?

4 **MR. TA:** Good afternoon, Your Honor. Can I just
5 address the various points that you just made, Your Honor?

6 The -- I think the important thing to remember here is
7 that the PSLRA doesn't address itself to a situation where a
8 lead plaintiff has withdrawn.

9 So, Trigon's come in, and has said basically: We were
10 second under the PSLRA process at the beginning back in March
11 of 2018. And therefore, we -- because we're second, we should
12 automatically be appointed.

13 But there are two problems with that, at least. First
14 problem as we see it is to be able to invoke that order, that
15 decision which held that they were second, second to us, they
16 have to basically abide by that order. And they didn't abide
17 by that order.

18 What does it mean to abide by that order? If they
19 submitted themselves to the PSLRA, and Your Honor held that
20 they were second, a person abiding by that order would have
21 stayed in federal court, would have continued to monitor the
22 litigation from federal court, and have been ready to step up.

23 **THE COURT:** Yes, but my concern about what you want
24 to do would totally subvert the PSLRA. It would say we go
25 through this whole process. The focus of the process is who's

1 got the biggest skin in the game. They then get to designate
2 their counsel.

3 You now were outside of -- you're saying: Well, I'm here,
4 I'm lead counsel, so now I want to substitute in somebody else
5 for lead plaintiff. It's putting -- it's putting everything
6 backwards.

7 And I can't find any case that justifies you doing -- I'm
8 not suggesting that this in any way is a bait-and-switch, but
9 it would be subjected -- it would open the door for such
10 tactics.

11 And I really -- there are various alternative ways to go.
12 But the one that I think I have the least solid ground to stand
13 on, frankly, is the one you are proposing.

14 **MR. TA:** I understand, Your Honor. But I think -- I
15 think this definitely was not a bait-and-switch. Mr. Anvari
16 has litigated this case capably and skillfully.

17 And as you know, we've gone through motions to dismiss;
18 we've gone discovery.

19 **THE COURT:** Sure.

20 **MR. TA:** We've even done a mediation. And we're now
21 at the point where we are at class certification, and there's
22 been extensive -- and the defendants know that. They've been
23 sending discovery requests completely targeted at class --
24 classification.

25 **THE COURT:** And I want to have you maintain your work

1 and continue on in this case. So I just have a problem with
2 your notion that you can -- you, the counsel, can now
3 designate the new lead plaintiff, who wasn't even part of the
4 party when we were going through the process.

5 **MR. TA:** I understand that, Your Honor. Can I just
6 make several points? One, I think this situation happens more
7 frequently than people intend. Lead plaintiffs withdraw for
8 all sorts of reasons. And the case law makes very, very clear
9 that a lead plaintiff's duty, a lead plaintiff's duty is to
10 withdraw if she or he perceives there to be a problem with her
11 or his adequate representation of the class.

12 **THE COURT:** Let me ask it this way. How can I simply
13 ignore the PSLRA process? Because that's what you are asking
14 me to do. We went through this whole process. And now you're
15 saying: Oh, just forget it. How can I do that?

16 **MR. TA:** Well, I wouldn't characterize it as ignoring
17 the PSLRA process. I think -- I think we need to recognize
18 that the PSLRA process doesn't address itself to this
19 situation. And numerous courts have held that, have
20 recognized that. They have said that the PSLRA is not
21 designed to address this situation.

22 **THE COURT:** It renders the first part of it
23 meaningless, under your approach. It's: Well, we can go
24 through this whole rigmarole, and then we get people in place,
25 and then the lead plaintiff elects to depart and so we just

1 turn to the lead counsel. Who's only there because of the
2 lead plaintiff.

3 I mean, you're there only because the person at the time
4 who I concluded had the biggest stake wanted you as their
5 counsel. Now, that person is nowhere to be found. I let them
6 go. And it's you who are now saying: I want this person as
7 lead plaintiff. That's taking the PLSRA process, and turning
8 it on its head.

9 **MR. TA:** Well, I think -- again, I think we went
10 through the PSLRA process, Your Honor. So, the entire process
11 was not meaningless. And the lead plaintiff performed a lot
12 of functions and a lot of purposes pursuant to his duty under
13 the PSLRA. And so we're now at this situation where he needs
14 to withdraw.

15 And I don't think it's -- it's -- it's -- it's correct to
16 look back at the process and say that entire process was
17 meaningless. As I said, we engaged in a one-day mediation with
18 the defendants. So this litigation has been hard fought, hard
19 fought throughout.

20 So, so, I just take issue with that characterization that
21 the entire process is meaningless, and that we are somehow
22 subverting the process. I think the PSLRA doesn't address
23 itself to this situation. And in this situation, numerous
24 courts have fashioned their own remedies.

25 We have pointed out at least three or four decisions from

1 the Northern District of California where the judges simply
2 said: Okay, who's available? And, and if --

3 **THE COURT:** Yeah, but those cases, several of them,
4 there was no opposition. I mean, there was nobody else to
5 turn to, effectively. So it was kind of a done deal.

6 Here, I had people who were participating in the process,
7 who were right behind you, who said -- who say: We're still
8 here, and we would like to participate.

9 And I have to say, I don't quite understand your argument
10 that: Well, they went off and filed in the state court. So
11 what? I mean, I don't understand why that is somehow
12 disabling.

13 They're also telling me that if they come back in, then
14 they will throw their lot with the federal court.

15 **MR. TA:** I think there are two problems with what
16 they're doing. As I said, first of all, if you're going to
17 invoke Your Honor's decision from March of 2018, you have to
18 conduct yourself like you were abiding by that order.

19 And I think when a plaintiff presents herself or himself
20 in front of this Court, subjects itself to the PSLRA process
21 and then Your Honor issues a decision, and then the plaintiff
22 says: You know what, I don't care for that decision I'm just
23 going to go file in state court, I think that shows that you've
24 withdrawn yourself from the process and that you've waived any
25 reliance on Your Honor's decision.

1 **THE COURT:** Do you have any case for the proposition
2 that participating in state-court litigation is somehow
3 contrary to good-faith participation in the PSLRA process?

4 **MR. TA:** I think the *Bank of America* case is the
5 closest example, where the judge said -- Milberg Weiss and its
6 clients filed in federal court. And then once they were not
7 appointed lead, they then took themselves down to state court
8 and filed there.

9 And the judge, the District Court in that case was
10 understandably upset that the plaintiffs were trying to
11 circumvent the PSLRA. And as Your Honor will recall --

12 **THE COURT:** Well, this issue was litigated here. And
13 I wasn't upset.

14 **MR. TA:** I understand, Your Honor. And I think
15 that's part of the problem.

16 The fact that you have a plaintiff who's in federal court,
17 removes itself from federal court to state court and says you
18 know what? You can't touch me in state court and is litigating
19 actively -- litigating actively in state court. And at the
20 same time when an opportunity arises in federal court, they
21 then jump back to the federal court.

22 And I think that's contrary to *Scion*. In *Scion* the
23 Supreme Court said basically: State-court plaintiffs, you stay
24 in your lane; federal court plaintiffs, you stay in your lane.

25 And I think, very importantly, if Trigon wanted --

1 **THE COURT:** So your position is their having gone,
2 consistent with *Scion*, to the state court because state court
3 has concurrent jurisdiction, they have somehow elected that
4 they will never come back into the federal process.

5 **MR. TA:** Elected never to come back, or, if they
6 wanted to come back, Your Honor, an essential pre-condition
7 for that would have been to terminate the state-court action.

8 And why do I say that? It's because when you present
9 yourself as an applicant under the PSLRA process, you are
10 basically submitting to the jurisdiction of the federal court.
11 And you can't submit to the jurisdiction of the federal court
12 when you have one foot firmly planted in state court.

13 And I think it's more than one foot. I think it's more
14 like close to two feet.

15 **THE COURT:** Let me ask you this. Could you work with
16 counsel for Trigon if I stay with something along the lines of
17 what I was thinking about, and have co-lead counsel?

18 **MR. TA:** Yes, Your Honor, I definitely can work with
19 them. I'm actually working with them in another case.

20 **THE COURT:** Okay.

21 **MR. TA:** I would ask, however, Your Honor, that LTL,
22 who's been active in this case as well, that they be given
23 maybe not a co-lead role, but at least that they be recognized
24 and be allowed to work on this case as well.

25 **THE COURT:** Okay. Let me hear from --

1 **MR. FLEMING:** So I'm a big believer in: When you're
2 winning, shut up.

3 **THE COURT:** Why don't you address the point about
4 having thrown your lot with the state court.

5 **MR. FLEMING:** Sure, exactly. And I understand why
6 the argument is made, but I don't think at all that it's
7 evidence of, somehow, a lack of good faith either on our part
8 or on our client's part.

9 Rather, we had a genuine concern, both for our client's
10 self-interest and the interest of the putative class, that
11 the -- this federal action litigated by Mr. Anvari was not
12 going to be the right vehicle or the best vehicle. We
13 obviously didn't know -- and I don't need to get into some of
14 the more sort of incendiary allegations that defendants have
15 made. But it was --

16 **THE COURT:** Against Mr. Anvari.

17 **MR. FLEMING:** Against Mr. Anvari, exactly. That was
18 news to us when it was filed. But it was certainly clear from
19 Your Honor's decision on the motion to dismiss, the
20 back-and-forth about the additional deposition of Mr. Anvari,
21 that there might be problems in having him certified as a
22 class representative.

23 And the reason that that's a problem and the reason that
24 we thought it was important to have another avenue for recovery
25 is that creates a dynamic where there's the possibility that

1 the lead plaintiff would take a cheaper settlement,
2 pre-certification.

3 Your Honor might be familiar, Judge Alsup has a standing
4 order that actually forbids settlement --

5 **THE COURT:** Quite familiar.

6 **MR. FLEMING:** Indeed, which is now up --

7 **THE COURT:** By the way, I don't have that order.

8 **MR. FLEMING:** Agreed. And frankly, if I was asked, I
9 would probably say that that's not the right approach. There
10 are circumstances where pre-certification settlements are a
11 good idea.

12 **THE COURT:** The Ninth Circuit is going to tell us,
13 one way or the other, very soon.

14 **MR. FLEMING:** We will find out. But the dynamic that
15 he identifies I think certainly is an important one. And the
16 idea that Mr. Anvari and his counsel went to a mediation,
17 knowing that there were these problems, knowing, frankly, that
18 there were these allegations that were going to be highly
19 injurious to Mr. Anvari's reputation as a professional, that
20 creates almost -- I'm not saying defendants were deliberately
21 trying to blackmail Mr. Anvari, but it does create that sort
22 of risk, where he might have taken a cheaper settlement.

23 And so by going forward in the state-court action, among
24 other things, it allowed us to get access to some of the
25 discovery that has been produced here, so that if a weaker

1 settlement, was reached we would at least have some ammunition.
2 We would have a sense of what the discovery that had been
3 produced in this action looked like.

4 **THE COURT:** Can you work with Mr. Ta and Mr. Hu?

5 **MR. FLEMING:** Yes. As noted, we are co-counsel in
6 the *McKesson* litigation, where our co-counsel Hagens, Berman
7 is one of the two lead firms. So we've worked together in
8 that case.

9 **THE COURT:** Then I'm now getting to the point that if
10 you're there, Hagens, Berman is there, your two colleagues
11 here, isn't that more than we need?

12 **MR. FLEMING:** Yes. And so that was the second
13 question I was going to address.

14 So assuming that Your Honor does want this sort of
15 Solomonic approach of having Trigon as the lead plaintiff, with
16 assistance from counsel who have been litigating to date, I
17 think that does make sense.

18 What I would suggest -- and it wasn't entirely clear --

19 **THE COURT:** I said "co-lead." Not "with assistance
20 from."

21 **MR. FLEMING:** Right. So that was sort of -- I'm not
22 sure what the Court was envisioning, whether the Court was
23 envisioning that the Hung Ta and LTL firms be counsel to
24 Trigon, which I think invades the sort of lead plaintiff's
25 ability to select his own counsel, which is both a

1 constitutional right and something required --

2 **THE COURT:** No, but in class action cases, when I'm
3 asked to structure the case, I suppose the only difference
4 there is that they continue to have a client. But --

5 **MR. FLEMING:** Right.

6 **THE COURT:** -- they can substitute, they can
7 represent a member of the class.

8 **MR. FLEMING:** Absolutely. And so I think at the
9 point that a class is certified, the Court has the power under
10 Rule 23 to appoint --

11 **THE COURT:** I see --

12 **MR. FLEMING:** My point is the PSLRA has a specific
13 process for lead plaintiff. And so I think there's a concern
14 with -- I don't think either under the PSLRA, or that the
15 Court can make Hung Ta and LTL Counsel to Trigon.

16 So what I would suggest is that the Court appoint Trigon
17 as lead counsel. And I will represent that we would add their
18 plaintiffs as named plaintiffs to a complaint. Including
19 Pumaro, who we'll address.

20 To the extent there's any *Morrison* issue that the
21 defendants want to raise, we will add those clients as named
22 plaintiffs, and we will consult and work cooperatively with
23 Hung Ta and LTL as our co-counsel.

24 But there can only -- I think it makes sense, and I think
25 the PSLRA, frankly, requires that there be a lead plaintiff.

1 And that that lead plaintiff have the choice of counsel.

2 **THE COURT:** Why do I need two firms from -- Hagens,
3 Berman and your firm?

4 **MR. FLEMING:** I would have to consult with Hagens,
5 Berman. I think we would agree to only one, with the
6 understanding that as lead counsel, my firm would have the
7 discretion to assign work as we see fit. And we would rely on
8 the Hagens firm for some of that work, as well. They've been
9 working with us throughout this.

10 They're obviously a well-respected firm in this court, so
11 I don't want to --

12 **THE COURT:** Why don't you back up to the beginning,
13 which was Mr. Ta's point that he's suggesting I'm overreacting
14 to the notion that the PSLRA process means that you can't
15 address a situation like we have here, where it wasn't
16 anticipated that the lead plaintiff is exiting the scene.

17 Why -- why can't he, at this stage, consistent with the
18 PSLRA, designate someone new?

19 **MR. FLEMING:** I think the problem is it would render
20 some of the language of the statute meaningless. The statute
21 says within 20 days of the complaint being filed, issue a
22 press release telling people that if they want to be lead
23 plaintiff, they have to file a motion within 60 days.

24 If that's not the rule that the Court is going to apply,
25 then --

1 **THE COURT:** I suppose the difference is -- and I
2 haven't been asked, nor am I suggesting I'm making some
3 finding that there was bad faith here.

4 If you could show bad faith, that would be a different
5 avenue. You'd say: Well, this was thwarting the PSLRA
6 process. But here, you know, things do happen. Not to go into
7 Mr. Anvari's situation, but lead plaintiffs come and go. I
8 mean, I see that in other non-PSLRA cases with some regularity.
9 So there's got to be a mechanism for this.

10 And as Mr. Ta suggests, where it's unopposed, it hasn't
11 been a problem.

12 **MR. FLEMING:** Sure.

13 **THE COURT:** My colleagues have said okay.

14 **MR. FLEMING:** And there is a mechanism. And I think
15 the more usual mechanism is that the lead plaintiff remains in
16 the case and may add additional named plaintiffs, who may seek
17 appointment as class representatives.

18 You see that particularly common where you might have a
19 lead plaintiff who only can assert Exchange Act claims,
20 Rule 10b-5 claims. But there's a potential Securities Act
21 claim, a Section 11 claim. So you might need to go out and get
22 a named plaintiff who bought in the IPO, or who bought on the
23 secondary offering, and who has standing to assert those
24 additional counts.

25 So I think the statute does give flexibility to a lead

1 plaintiff to assemble a team of additional named plaintiffs, if
2 necessary, and if in the best interest of the class.

3 But the lead plaintiff is a special statutorily carved-out
4 role. And I think it would sort of render the statute a
5 nullity if the rule was once a lead plaintiff has been
6 appointed, then it's sort of open season, and the lead
7 plaintiff can step back.

8 I'm not suggesting there was bad faith here. But I also
9 do think it would create a very dangerous dynamic where people
10 might be -- law firms might be incentivized to move forward
11 with lead plaintiffs who they think might not make it all the
12 way, as long as you can get appointed, and then swap someone
13 else in.

14 So I do think, even ignoring the sort of strict text of
15 the statute, that there is a real policy concern. That the
16 Court should be hesitant to incentivize a system where
17 plaintiffs could be swapped in and out.

18 **THE COURT:** So your notion is that you would file an
19 amended complaint.

20 **MR. FLEMING:** I think we would speak to defendants.
21 And if we could, rather than filing, file a stipulation
22 similar to those that have already been filed, adding a
23 paragraph. As we noted in our papers, Trigon can't allege
24 that it didn't read the contribution terms.

25 I would want to think about whether the current complaint,

1 whether there are any other allegations that need to be made to
2 address any *Morrison* argument that the defendants might raise.

3 But again, as I said, we would probably seek to add Pumaro
4 as well, which is a U.S. entity. And wouldn't have those
5 problems, assuming that Pumaro's willing.

6 **THE COURT:** If I recall correctly, there was a motion
7 to -- a class certification motion that's been filed.

8 Has it been filed, Mr. Ta? Did you file it?

9 **MR. TA:** Yes.

10 **THE COURT:** So what happens to that?

11 **MR. FLEMING:** Again, I would talk to defendants. It
12 would probably make sense that that be withdrawn and a new
13 motion filed, at the very least. As I said, we have some of
14 the discovery. I don't think it's all of it. So we would
15 want a bit of time --

16 **THE COURT:** Whatever happens, Mr. Anvari is not going
17 to be there. So you'll need a new one because I presume the
18 motion was --

19 **MR. FLEMING:** The pending motion was to appoint --

20 **THE COURT:** (Inaudible) -- adequacy would say
21 something about Mr. Anvari.

22 **MR. FLEMING:** The pending motion sought to add
23 Mr. Frunze and Pumaro. But again, it would need to be amended
24 to add Trigon, which would seek appointment not only as a lead
25 plaintiff, but also a class rep.

1 So I think it would make sense for that motion to be
2 denied without -- denied without prejudice. And then we can
3 work out a schedule to file a renewed motion with the new
4 leadership structure.

5 Certainly, it doesn't reference my firm or our adequacy to
6 be class counsel, so we'd need to address our adequacy.

7 **THE COURT:** And run by again your view on the state
8 court proceedings, what you plan to do.

9 **MR. FLEMING:** Sure. So if Trigon is appointed as
10 lead plaintiff here, it would dismiss the state-court action.
11 I think we would probably -- we've been cooperating with
12 Mr. Baker, who remains in state court. I think we would
13 continue to do that, to the best of our ability.

14 I think it's important for the class not to have both
15 actions sort of running off in different directions, or
16 intention. I'm confident that we would be able to continue to
17 work with Mr. Baker to the extent possible. Defendants have a
18 different view. They're trying to stay the state-court action,
19 and I suspect would continue to do so.

20 **THE COURT:** Okay. Who on the defense side wants to
21 say anything?

22 (Off-the-Record discussion between counsel)

23 **MR. MALZAHN:** This is Scott Malzahn with Baker
24 Marquart. From the defendant's perspective, of course, it is
25 up to Your Honor to decide who's the proper lead plaintiff in

1 this case. We just want to ensure that there is a proper
2 process that is followed.

3 It sounded like what Trigon's counsel was suggesting would
4 be acceptable. We're happy to meet and confer with them about
5 a schedule, moving forward; that the motion for class
6 certification would be denied without prejudice. And we can
7 talk about a stipulation, to avoid having to file an entirely
8 new amended complaint. I think that process would make sense,
9 from our perspective.

10 **THE COURT:** Okay. Thank you.

11 Anyone else from the defense side? You don't have to.

12 **MR. GIBBS:** No -- I had just one very quick point.
13 Patrick Gibbs for Dynamic Ledger Solutions.

14 We may also need to rethink some other dates that have
15 been set, discovery items and the like. But I would propose we
16 just kick that to the discussion with -- with the new
17 leadership group.

18 **THE COURT:** Okay. Mr. Ta?

19 **MR. TA:** Your Honor, can I just clarify one or two
20 points? Mr. Frunze and Pumaro LLC are already named
21 plaintiffs in this action. They were added by stipulation,
22 and it was so ordered by the Court.

23 **THE COURT:** They were not part of the process during
24 the initial period.

25 **MR. TA:** Correct. Oh, Mr. Pumaro was. Pumaro LLC

1 was.

2 **THE COURT:** Yes, but not Mr. Frunze.

3 **MR. TA:** Not Mr. Frunze, correct, Your Honor.

4 **THE COURT:** Right. If you take Mr. Frunze and Mister
5 -- putting Mr. Frunze aside for a moment, you don't have any
6 argument, as I understand it, that Trigon isn't the next party
7 with the most skin in the game, if you will.

8 **MR. TA:** Pursuant to the order structure that was set
9 back in March of 2018, correct, Your Honor.

10 **THE COURT:** Right. Thank you. Okay. Any further
11 discussion?

12 (No response)

13 **THE COURT:** I'll go back and think through some of
14 the issues that you've highlighted for me, and come up with
15 some notion of how we're going to proceed.

16 And then I will encourage the parties -- whatever happens,
17 there will be a -- some meeting and conferring that I will want
18 you to all do, once you get the benefit of my order. And then
19 you can go from there.

20 So, very good. Thank you.

21 **MR. KLEIN:** Thank you, Your Honor.

22 (Proceedings concluded)

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4 **CERTIFICATE OF REPORTER**

5 I, BELLE BALL, Official Reporter for the United States
6 Court, Northern District of California, hereby certify that the
7 foregoing is a correct transcript from the record of
8 proceedings in the above-entitled matter.

9
10 *Belle Ball*

11 _____
12 Belle Ball, CSR 8785, CRR, RDR

13 Monday, March 11, 2019
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